Nos. 90-954; 90-1004

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.
Petitioners,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.
Respondents.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION, ET AL.
Petitioner,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.
Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court grant review to resolve an alleged conflict in the circuits over the proper standard for modifying a consent decree, when petitioners' principal objection here is that the lower courts improperly applied their preferred legal standard to the facts of this case?

May a local official be relieved of an obligation to which he consented to settle a complicated civil rights action, on the ground that the obligation is not required by the Constitution?

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STATEMENT OF THE CASE

A. Introduction

This lawsuit was commenced in 1971 on behalf of the class of inmates of the Suffolk County Jail, a county facility for pre-trial detainees then known as the "Charles Street Jail."[1/] Defendants were the Sheriff of Suffolk County, who operates the jail, M.G.L. c. 127, §16, the Mayor and City Councilors of the City of Boston, who constitute the Suffolk County Commissioners and who have the duty to provide a "suitable jail," M.G.L. c.34, §3, and the Massachusetts Commissioner of Correction, who operates state institutions and who sets standards for county facilities. M.G.L. c.124, §1; c.127, §§1A, 1B.

The two petitions in this case would lead the Court to believe that the consent decree which the Sheriff sought to modify was the product of his willingness to settle a disputed litigation by giving far more than was legally

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[1/] The class was certified on June 29, 1971. (C.A. App. 9).

References are as follows:

Petitioner's Appendix	Pet. App.
Respondents Appendix	Resp. App.
Appendix for First Circuit Court of Appeals	C.A. App.
Sheriff's Petition for Writ of Certiorari	Sher. Pet.
Commissioner of Correction's Petition for Writ of Certiorari	Comm. Pet.

required and that the district court later arbitrarily refused to apply the proper legal standard and also misapplied that standard to the facts of this case. The petitions further suggest that review is warranted in this case to resolve an alleged conflict among the circuits over the proper legal test to be used in deciding whether a consent decree is to be modified. Because none of those propositions accurately reflects the record below, it is necessary to review the proceedings in some detail. Such a review more than amply demonstrates that, even if there were a conflict among the circuits, which we doubt, this case does not present a proper vehicle for resolving it because the district court found against petitioners on the very standard that they ask this Court to adopt. Moreover, the record fully supports the refusal of the district court to eliminate the one prisoner per cell standard in the consent decree because it was the central element of the relief that the plaintiff class sought throughout this case.

B. Proceedings Leading to the Consent Decree

In its initial Opinion and Order of June 23, 1973, the district court held that the conditions at the Suffolk County Jail violated the detainees' rights to due process of law under the Fourteenth Amendment to the United States Constitution. Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D.Mass. 1973). (Pet. App. 23a). The court reviewed the unhealthy, inhumane and dangerous conditions of confinement, Pet. App. 25a-35a, and concluded that the jail must be replaced. (Pet. App. 45a). One of the most important aspects of confinement was the then-prevailing practice of double-celling:

> Cell size is approximately 8' wide x 11'

> long x 10' high, and was designed and constructed for single occupancy. . . . . It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions.
>
> . . .
>
> On July 12, 1972 an inmate was beaten to death by his cellmate, who had beaten a previous cellmate in May 1971. Despite the unusual nature of this occurrence, it is evidence of the potential for interpersonal friction inherent in a system of double occupancy of cells . . . .

(Pet. App. 26a-27a, 27a, n.4). The court concluded that this practice violated the constitutional rights of the pre-trial detainees at the jail:

> Briefly, an inmate at Charles Street who merely stands accused spends from two months to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in a cell with another, strange, and perhaps vicious man. When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cell-mate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away.

(Pet. App. at 42a). Accordingly, as the first element of the interim relief, the court permanently enjoined the defendants "from housing at the Charles Street Jail after

November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial." (Pet. App. 48a). The court also enjoined the defendants from holding any detainees at the jail after June 30, 1976. (Pet. App. 48a). No appeal was taken by the defendants.

In 1977, after virtually no progress had been made on producing a plan for a replacement facility, the district court set a firm date for the closing of the jail. On appeal, the First Circuit affirmed, noting that "[i]t is now just short of five years since the district court's opinion was issued. For all of that time the plaintiff class has been confined under conditions repugnant to the constitution." Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99 (1st Cir. 1978). However, as a result of an offer by plaintiffs' counsel, the court also provided that the closing would be further extended if there were an enforceable commitment by defendants to construct a new facility according to a design and plan to be approved by the district court. Specifically, the defendants would have to submit "a plan for a new facility including commitments for adequate funding, agreement on a site, projected target dates for the beginning and completion of construction, and an architectural design or written description of the conditions of confinement within the new facility consistent with constitutional standards." Id. at 101. If no such plan was submitted and approved prior to October 2, 1978, the jail was to close on that date. Id. at 100-101.

The defendants filed a plan on September 28, 1978, which became the basis for the "consent decree" that is now before this Court. Plaintiffs supported the plan, and it was approved by the district court on October 2, 1978. As a result, the old jail was permitted to remain in use

until completion of the new facility. In approving the plan, the district court emphasized that it provided for single cell occupancy in the new facility:

> the critical features of confinement, such as single cells of 80 sq. ft. for inmates are fixed, and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions are included.

(Memorandum and Orders as to Pretrial Detention, October 2, 1978) (emphasis added). (Resp. App. 3a). The order recognized that a final, more detailed architectural program would be prepared, but noted that "there are unequivocal commitments to conditions of confinement which will meet constitutional standards." Id. (emphasis added). The court ordered the defendants not to deviate from the plan "in any substantial way" without court approval and "without delay [to] take all steps to carry [it] out." (Resp. App. 4a).

Thereafter, an architectural program was negotiated with the plaintiff class which established the standards for the new jail. The program was consistent with the previously approved plan, and it provided for single occupancy cells for both male and female detainees. On May 7, 1979, the district court approved the program which was directly embodied in a consent decree. Like the prior court orders and the prior plan, it specifically provided for single cell occupancy. (C.A. App. 237, 242).

In its preamble, the decree noted the desire of all

parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design" and that the attached and incorporated architectural program "sets forth a program which is both constitutionally adequate and constitutionally required." (Pet. App. 16a). The preamble also included the recognition by the parties of the mutual trade-offs involved: the defendants would be allowed to use the existing facility until a new one was constructed, and the plaintiffs would obtain specific minimum criteria for incarceration of future generations of inmates. (Pet. App. 15a-16a). The decree further provided that defendants could not "change or depart from [the architectural program] in any substantial way except with the assent of the parties or the approval of the Court." (Pet. App. 21a). The new jail was to be completed by 1983.

C. Subsequent Proceedings Relevant to the Consent Decree

Judge Keeton took over the case shortly after the decree was approved.

The detainee population increased steadily after entry of the decree. (Pet. App. 10a); see C.A. App. 649, 651, 380, 944. The initial planned capacity of the new jail was 309. However, by November, 1982 the Sheriff notified the parties that a larger facility would be required. (C.A. App. 642). In October of 1984, litigation was commenced before a Single Justice of the Massachusetts Supreme Judicial Court which came to focus on the adequacy of the planned capacity of the new jail. The plaintiffs were intervenors in this action. The Sheriff argued that the planned capacity of 309 was insufficient and proposed that

the Single Justice order, pursuant to state law, various other county defendants to provide him with a jail of 435 cells in order to house a detainee population of that same number. The Single Justice ordered that the larger jail be built, and this order was affirmed by the full bench. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E. 2d 361 (1985).

Subsequently, the district court approved a modification of the consent decree to allow the defendants to increase the capacity of the new jail, provided, however, that "single-cell occupancy is maintained under the design for the facility." Order, April 11, 1985 (emphasis added) (Resp. App. 6a).[2/] Petitioners assented to this order.

As the design phase proceeded, the population continued to rise. The district court found that there was a "marked upward trend in the number of inmates held in the Sheriff's custody since 1985." (Pet. App. 11a). In fact, it was apparent by 1985 that the population exceeded the planned number of regular male housing cells.[3/]

Despite the increase in commitments, the Sheriff was always able to comply with the single cell injunction

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[2/] The district court's order did not provide for a specific number of cells, but instead required that "the relative proportion of cell space to support services will remain the same as it was in the Architectural Program." (Resp. App. 6a-7a).

[3/] The yearly average for 1985 was 326. (C.A. App. 380); however, the number of cells allocated for regular male housing in the new jail at that time was 282. (C.A. App. 293).

which, at the Charles Street Jail, entailed a population limit of 342. This was accomplished through a number of measures, including the transfer to state prisons of pre-trial detainees who previously served felony sentences in state correctional institutions, pursuant to M.G.L. c.276 §52A, Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1198 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974), Superior Court bail reviews conducted by the Bail Appeal Project, Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975), and special Superior Court sessions pursuant to an order of the Single Justice, in which bail orders were compared and reviewed on a county-wide basis, selecting suitable detainees for transfer to halfway house or release on personal recognizance. (C.A. App. 389).

During this period, the Sheriff made no motion to modify the decree. No party suggested that a new design should be considered. Instead, planning continued under the single occupancy model, and ultimately, the facility was constructed on that design. According to the Sheriff's affidavit, filed in the district court, he "chose" the "certainty of a new facility" and decided not to seek a change in its design because that would have involved, in his view, "further delay and additional expense to the public." (C.A. App. 720).

Ground breaking for the new Suffolk County Jail took place on Nashua Street in Boston in September of 1987. The foundation was completed by the Spring of 1988, and construction was completed in the Spring of 1990. The

detainees were moved to the jail in late May, 1990.[4/]

The total male capacity at the new jail is 413. (C.A. App. 943, 945). This constitutes an increase of 71 cells over the previous male capacity at the Charles Street Jail, which was 342. Id. The regular housing cells are designed in modular units. (C.A. App. 365). Each unit contains two tiers of cells with an adjacent dayroom, showers, visiting rooms, quiet rooms, and recreational facilities. The cells are 70 square feet, with approximately 40 square feet of available floor space. The cells have doors, not bars, with a narrow window. (C.A. App. 605). The door was designed to maximize the detainee's privacy when locked in the cell. The window provides a wide field of vision from the outside only if the observer is immediately adjacent to the door. Each cell has a toilet and sink unit which is placed near the door at an angle so that the detainee cannot be observed while using the toilet. From the control room, where the officers are stationed, it is possible to maintain observation only of the dayroom area outside the cells. (C.A. App. 614, 618-22).

D. The Proceedings Below

On July 17, 1989, when the construction of the jail was nearing completion, and after it was no longer possible to change the design of the building, the Sheriff moved the district court for modification of the consent decree, pursuant to Fed.R.Civ.P. 60 (b)(5) or (6), to allow the double bunking of male detainees in 197 of the jail's

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[4/] When the site was changed to Nashua Street, the jail was redesigned by the state agency responsible for the construction, and the number of cells was increased from 435 to 453.

316 regular male housing cells. The maximum capacity under the Sheriff's proposal would be 650, representing a 43.5% increase over the planned capacity of 453.[2/]

In the district court, the Sheriff argued that there were certain changes in the law and the facts which required modification of the Decree. The changed circumstances cited by the Sheriff were (1) an asserted change in the law, effected by the Supreme Court decision in Bell v. Wolfish, 441 U.S. 520 (1979), which was decided one week after the Consent Decree was approved by the district court, and (2) an asserted change in operative fact, to wit, increases in the Suffolk County pretrial male detainee population.

The Sheriff proposed adding a second, bunk-style bed on top of the existing bed in 197 cells that were designed for single occupancy. Those detainees who would be double bunked would be out of their cells for 12 hours per day and locked in their cells for 12 hours per day.

The Commissioner of Correction took no position on the Sheriff's motion -- filing no papers and making no oral argument.

Plaintiffs opposed the motion. The court received evidence in the form of affidavits. Plaintiffs introduced evidence demonstrating that the cells were specially designed to maximize privacy for a single occupant and that, as a result, double bunking in these cells would present a serious risk to the safety of the detainees.

[2/] Under the Sheriff's plan, the male capacity would be 610 (C.A. App. 943, 945), and the female capacity would be 40 (C.A. App. 294).

Multiple occupancy would inevitably increase tensions and increase the likelihood of violent behavior between detainees. (C.A. App. 626-28, 881-84). According to the evidence, it would be extremely difficult to observe or hear altercations between two detainees in a cell because of the layout and design of the cells, the design of the cell door, and the location of the control room. (C.A. App. 614, 618-22).

Plaintiffs also submitted an architectural analysis which demonstrated that increasing the capacity by adding 197 detainees would make it impossible to comply with the district court's order to maintain "the relative proportion of cell space to support services" as required by the architectural program.[6] Order, April 11, 1985 (Resp. App. 6a-7a).

Plaintiffs' architectural expert also addressed the question of when the design of the jail could have been changed to accommodate a larger capacity. The uncontradicted evidence was that changes could have been made at any point prior to April 1988, when the foundation was completed. (C.A. App. 616-17).

The district court judge took a view of the Nashua Street Jail on March 9, 1990 and made a close inspection

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[6] The expert found that numerous standards contained in the architectural program would be violated by the Sheriff's proposal. (The architectural program incorporates the American Correctional Association standards, but in certain respects exceeds those standards.) Most importantly, the standard for single occupancy cells of 70 sq. ft. would not be met. (C.A. App. 602).

of the entire facility. (C.A. App. 69).

After hearing, the district court denied the Sheriff's motion for modification of the Decree. (Pet. App. 13a). The court found it unnecessary to decide whether double celling in the new facility would be unconstitutional (Pet. App. 12a), since it concluded that modification was not warranted in any event.

First, the court considered whether the Sheriff had met the test for modification set forth in United States v. Swift & Co., 286 U.S. 106, 119 (1932). Applying this standard, the court found no basis for relief since the circumstances advanced by the Sheriff were neither new nor unforeseen. The court found that Bell v. Wolfish "did not directly overrule any legal interpretation on which the 1979 consent decree was based." (Pet. App. 10a). Rather, the court held that the consent decree constituted "an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination on the issue of constitutionality." (Pet. App. 13a). The court also found that the Suffolk County pretrial detainee population had been increasing since the entry of the decree, that there had been a "marked upward trend in the number of inmates held in the Sheriff's custody since 1985" and therefore, the increase in population was neither new nor unforeseen. (Pet. App.11a).

Next, the court considered whether the Sheriff had presented sufficient grounds for modification under the "flexible" standard advocated by him. Applying this standard, the court still concluded that "modification would not be appropriate." (Pet. App. 12a). Specifically the court found that:

> [t]he proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this litigation -- perhaps even the most important element. Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential. The type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree.

(Pet. App. 12a).

The Sheriff and the Commissioner of Correction appealed. The First Circuit, in a per curiam opinion, affirmed, stating "we are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." (Pet. App. 2a).

REASONS FOR DENYING THE PETITIONS

I. THIS CASE PRESENTS NO OCCASION TO CONSIDER THE STANDARD WHICH SHOULD GOVERN MODIFICATION OF CONSENT DECREES.

In Bd. of Educ. of Oklahoma City v. Dowell, No. 89-1080 (U.S., January 5, 1991)(Westlaw, S.Ct. file) this

Court held that "[n]o additional showing of 'grievous wrong evoked by new and unforeseen conditions' was required on a school board's motion to vacate a decree to which they had not consented, where "the purposes of the desegregation litigation had been fully achieved." Id. at 15. Oklahoma City did not itself concern the question of what standard to apply to modification of a decree where the provision in question had been specifically negotiated and agreed upon since the order there was court imposed. Id. at 5. Oklahoma City was also specifically limited to school desegregation cases, which have special needs and which, the Court observed, "are not intended to operate in perpetuity," as is the decree here. Id. at 16.

Petitioners rely on various circuit court cases which apply a similar standard, which they refer to as the "flexible" standard, to consent decrees. They argue that certiorari should be granted to resolve what they contend is a conflict in the circuits as to whether this standard should be applied to consent decrees. In addition, although he took no position on this issue in the district court, petitioner Commissioner also argues that certiorari should be granted because of the "national importance" of the question. (Comm. Pet. at 22).

However, the barest examination of the record in the case reveals that the decision below does not actually conflict with any case cited by petitioners, that it is fully consistent with this Court's recent decision in Oklahoma City, and that the question purportedly presented is not even posed. Indeed, the only issue which is truly raised by the case is the entirely conventional one of whether a district judge abused his powers in a decision clearly committed to his discretion.

A. The Court of Appeals' Decision Was Not In Conflict With The Decisions Of Any Other Circuit Court Or of This Court.

Both petitions obscure the fact that the particular decision under review does not conflict with any other court of appeals decision cited by the petitioners because it rests on an alternative ground on which there is no arguable conflict. For similar reasons, there is no arguable conflict with the decision in Oklahoma City. The holding of the district court was that the motion for modification should be denied under either the Swift grievous wrong/unforeseen conditions standard or the "flexible" standard. The court of appeals affirmed in a two paragraph per curiam opinion which simply noted that the court was "in agreement with the well-reasoned opinion of the district court" that "circumstances had not changed sufficiently to justify modification of the consent decree." (Pet. App. 2a). What standard the First Circuit would apply to modification of a consent decree if circumstances forced it to choose is not at all clear from the per curiam opinion here. In previous decisions that court has, from time to time, relied on the very cases which petitioners claim are in conflict. See Fortin v. Comm'r. of Mass. Dept. of Public Welfare, 692 F.2d 790, 800 (1st Cir. 1982); Mass. Ass'n of Older Americans v. Comm'r. of Public Welfare, 803 F.2d 35, 38-39 (1st Cir. 1986); U.S. v. Commonwealth of Mass., 809 F.2d 507 (1st Cir. 1989). In the latter case, the court observed:

> Recognizing that in public litigation the beneficiaries are commonly third parties, several appellate courts have held that

> district courts, which are responsible for overseeing the execution of consent decrees, should have broad discretion in determining whether the objectives of the decree have been substantially achieved. We have stated that "in examining a decree issue in public law litigation . . . the appellate court should recognize that broad 'judicial discretion may well be crucial' for the district judge to secure 'complex legal goals.'" Massachusetts Ass'n of Older Americans v. Commissioner of Public Welfare, 803 F.2d 35, 38 (1st Cir. 1986) (quoting AMF, supra, 711 F.2d at 1101). See also Twelve John Does v. District of Columbia, 861 F.2d 295, 298 (D.C. Cir. 1988); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 970 (2d Cir.), cert. denied, 464 U.S. 915 (1983).

Id. at 509-10.

The holding of the court of appeals, accordingly, in no way conflicts with the decisions urged by petitioners. Since the district court held that modification was not warranted under the "flexible" standard, the only legal issue directly posed in this case is whether the appellate court correctly upheld the district court's ruling in this respect. Unless application of the "flexible" standard necessarily mandated modification of the decree, the question of whether the "flexible" standard controls would never arise. But clearly, the flexible standard does not require the relief sought as a matter of law. Courts of appeals, applying a flexible standard, have often upheld --

and even required -- the denial of motions similar to the one at issue here. See Badgley v. Santacroce, 853 F.2d 50, 54-55 (2d Cir. 1988) (reversing modification of consent decree population cap); Twelve John Does v. District of Columbia, 861 F.2d 295, 302 (D.C. Cir. 1988) (upholding denial of modification of consent decree capacity limit); Ruiz v. Lynaugh, 811 F.2d 856, 862-63 (5th Cir. 1987) (upholding refusal to modify "crowding stipulation" which included minimum living space for each inmate). For reasons which follow, the courts below properly applied the "flexible" standard in the facts of this case. Thus, the district court's rejection of the Sheriff's motion under the "flexible" standard means that any possible conflict among the circuits had no bearing on the outcome of this case.

B. Proper Application of The "Flexible Standard" Does Not Mandate Modification Of The Decree.

This Court has previously noted that the standard for appellate review of the decision whether to modify a decree is whether the decision constituted an abuse of discretion. Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 263, 263 n.7 (1978). There is no conflict of the circuits on this point.[7] There could be no

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[7] U.S. v. Western Elec. Co., 894 F.2d 430, 434-35 (D.C. Cir. 1990); Manning v. Trustees of Tufts College, 613 F.2d 1200, 1204 (1st Cir. 1980); Sieck v. Russo, 869 F.2d 131, 135 (2nd Cir. 1989); Harris v. Martin, 834 F.2d 361, 364 (3rd Cir. 1987); Transportation, Inc. v. Mayflower Services, 769 F.2d 952, 954 (4th Cir. 1985); Melear v. Spears, 862 F.2d 1177, 1182 (5th Cir. 1989); Smith v. Secretary of Health and Human

other rule. The exigencies of long-term administration of a complicated decree clearly require that the court most familiar with the decree, the history of the litigation, the context, and the local circumstances be accorded a wide latitude. Accordingly, for the Court to reverse the judgment below, it would have to engage in the fact-bound determination of whether, in the light of all of the particular circumstances, in the context in which they arise, and in the light of the unique history of the case, the court of appeals was required to hold that Judge Keeton necessarily abused his discretion in finding that the circumstances did not sufficiently warrant modification. It is for this reason that petitioners acknowledge that any error is in the alleged failure of Judge Keeton to apply the flexible standard properly.[8/]

Whether the district judge abused his discretion is

Services, 776 F.2d 1330, 1332 (6th Cir. 1985); Williams v. Hatcher, 890 F.2d 993, 995 (7th Cir. 1989); In re Champion, 895 F.2d 490, 492 (8th Cir. 1990); National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 765 (9th Cir. 1989); L.A. Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989); Equal Employment Opportunity Commission v. Mike Smith Pontiac GMC, Inc., 869 F.2d 524, 528 (11th Cir. 1990).

[8/] See Sher. Pet. at 9 ("[T]he court then purported to apply the 'flexible standard' . . . ."), 14 ("The court then purportedly went on to apply the flexible standard . . . ."), 15 ("[t]he district court applied that element in a manner that is completely inconsistent with the manner that the other circuits have applied it.") and Comm. Pet. at 31 ("[I]f the lower courts had appropriately applied the flexible standard . . . ."), 33 ("[i]f the lower courts had correctly applied the flexible standard . . . .")

hardly a question worthy of certiorari. In any event, Judge Keeton was clearly correct here.

First, even under the petitioners' formulation of the standard, modification should be denied if it is inconsistent with a principal purpose of the decree. (Comm. Pet. at 17.) This fundamental point was reaffirmed by Oklahoma City. "[A decree] may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." Id. at 15 (quoting United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968). See, e.g., Badgley v. Santacroce, 853 F.2d 50, 53 (2d Cir. 1988) (denying modification of population cap under flexible standard).

The requirement of single cell occupancy was a central objective and focus of this lawsuit from the very outset. The single occupancy provision was a vital component of the decree; according to the district court at the time, it was a "critical" feature. As Judge Keeton found, "[t]he proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this litigation -- perhaps even the most important element." (Pet. App. 12a).

Where a consent decree is in issue, a court must look at what the parties agreed upon, as embodied in the decree itself, to determine whether the purposes of the lawsuit have been achieved.

Consent decrees are entered into by parties to a

> case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

In this case, the decree was specifically negotiated in the knowledge that the constitutionality of multiple occupancy was actually sub judice in this Court, see, Bell v. Wolfish, 441 U.S. 520 (1979), and was an open question in the First Circuit as well. See, Feeley v. Sampson, 570 F.2d 364, 370 (1st Cir. 1978). Indeed, the entire point of the decree was to agree upon the standards to be observed in the new facility without further litigation. As the district court observed, "[i]t was an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination of the issue of

constitutionality." (Pet. App. 13a). Moreover, the plaintiffs made substantial concessions on other points in order to achieve this agreement. The parties agreed to reduce the space per cell from 80 to 70 sq. feet. (C.A. App. 237, 242). Most importantly, the plaintiffs agreed to a further delay in closing the old jail -- a delay which ultimately lasted for eleven years.[2/]

In these circumstances it would be intolerable to permit a party to renege because, in retrospect, he now prefers the result he might have achieved had he litigated. Indeed, the commentator upon whom the petitioners most rely for the appropriateness of a "flexible" standard, holds that, even under that standard, modification of the decree should be denied in the exact circumstances presented here, for this reason alone. Jost, From Swift to Stoots and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1135-36 (1986).

Second, in the ten years since the consent decree was entered, the single cell occupancy requirement has been relied upon by all parties to such an extent that modification now would cause especially serious harm to the plaintiff class. Single occupancy was the crux of the design of the new facility. Numerous other design features were based upon that assumption. Most importantly, the architects utilized this feature to develop a unique plan to insure privacy for the detainees. Unlike the plan of virtually every other jail in the United States, the plan here

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[2/] "Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential." (Pet. App. 12a).

-- involving the configuration of the individual cells, the design of the cell doors and windows and the layout of the cells within the housing units -- was to minimize visual observation of the interior of the cell and thus to maximize privacy. The indispensable premise of this design was that use of each cell was to be by no more than one detainee. Similarly, the cell size was set at half the Massachusetts minimum for double occupancy. 103 C.M.R. §§450.321; 972.03(2). Indeed, relying upon the single occupancy guarantee, plaintiffs agreed to a reduction of the 80 square foot design contained in the original plan. Obviously, placing two detainees in this type of cell would create dangers not even present in the old facility. The result of utilizing this unique single occupancy design for double occupancy would convert the very reforms promised by the decree into instruments which threaten the safety and destroy the privacy of the inmates. Moreover, under the Sheriff's double bunking proposal, it would be impossible to maintain "the relative proportion of cell space to support services" as required by the district court because there would be 43.5% increase in population without any increase in support service cases. (Resp. App. 6a-7a). In a real sense, the detainees would have received the "worst of both worlds."

Throughout the decade of planning for the new jail, as the detainee population steadily rose, neither the petitioners nor any other party ever suggested that the decision in Bell v. Wolfish or the increases in population, or both, justified modification of the single occupancy requirement. On the contrary, in 1985, when the Sheriff sought increased capacity, he sought the authority to build a jail with more cells, based on the premise that each additional inmate would require an additional room. In response, the district

court expressly provided that the defendants were permitted to increase the capacity by any amount, so long as "single occupancy be maintained." (Resp. App. 6a). The petitioners assented to this order. The planning therefore continued without change. If the Sheriff had brought his motion at any time before the foundation was completed -- as late as early 1988 -- it would have been possible to change the design of the jail and obviate the problems discussed above. The Sheriff has conceded that he made the deliberate decision not to seek any change in the physical plant before completion of construction (C.A. App. 720); instead he simply waited until it was done, and too late to change, and then requested permission to double cell.

The Commissioner argues that, in the absence of the additional capacity sought by the Sheriff, state court judges will commit some defendants to halfway houses when they otherwise might have held them at the jail and some inmates will have to be transferred to older facilities not governed by single occupancy decrees. Thus, although he took no position on the issue in the district court, the Commissioner now argues that Judge Keeton's decision threatens the public safety and, moreover, was actually contrary to the interest of the plaintiff class. This is nothing more than sheer hyperbole. The record does not reveal a single instance in all the years of single occupancy at the old jail in which a dangerous prisoner was ever released. In fact, the record shows that persons selected by state court judges for half-way house commitment were chosen precisely because they do not constitute such threats. (C.A. App. 389, 399-400). Moreover, the inescapable fact is that when he filed his motion, the Sheriff was then able to operate a 342 cell jail on a single

occupancy basis -- and then when the new jail opened, there was an immediate 71 cell increase in the male capacity.

It is true that when capacity is reached, some detainees are transferred to other jails. Massachusetts is currently engaged in a massive jail construction program.[10/] Pending completion, it is obviously not possible to provide complete relief to all detainees,[11/] This did not, however, require the judge to jettison the relief guaranteed to the class in this decree and reduce the conditions of all to the lowest common denominator.

In sum, whatever the standard, it cannot be said that, as a matter of law, in light of all the circumstances, Judge Keeton was required to modify the decree. More fundamentally for present purposes, even if Judge Keeton

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[10/] New county correctional facilities are currently being constructed in Suffolk (1986 Mass Acts c.658, §1), Hampden (1986 Mass. Acts c.658, §4) Essex (1985 Mass. Acts c.799, §8) and Norfolk counties (1985 Mass. Acts c.799, §8). In addition, the Commonwealth has appropriated funds for several new correctional facilities. (1986 Mass. Acts c.658, §5).

[11/] However, it is not true that this jail is the only one governed by a single cell occupancy decree. See Richardson v. Sheriff of Middlesex County, 407 Mass. 455, (1990) (single cell occupancy order for Middlesex County Jail upheld); Perry v. Fair, No. 89-40031-Z (D. Mass.) (consent decree of October 6, 1989 for Worcester County Jail and House of Correction requiring single cell occupancy); Brown v. Ashe; C.A. No. 81-0280-F (D. Mass.) (consent decree of July 26, 1990 mandating single cell occupancy for Hampden County Jail and House of Correction.)

were arguably wrong, that would not militate in favor of certiorari, which, if granted, would at best produce a decision closely tailored to the idiosyncratic features of this case. In the final analysis, this is simply a case in which the petitioners' arguments for discretionary relief were carefully considered, but rejected, below. There is no basis for review by this Court.

II. THIS CASE PRESENTS NO OCCASION TO CONSIDER THE QUESTION OF WHETHER A LOCAL OFFICIAL MAY COLLATERALLY ATTACK A DECREE TO WHICH HE CONSENTED ON THE GROUND THAT THE RELIEF WAS NOT LEGALLY REQUIRED.

Petitioner Commissioner argues that even though the Sheriff consented to entry of the decree, he is entitled to collaterally attack it on the ground that the relief is not constitutionally required. In the Commissioner's view, the Sheriff enjoys this right even in the absence of any change of circumstances whatsoever and whether or not the purposes of the decree have been achieved. Apparently, this right may be asserted at any time, whether one day or ten years after the Sheriff gave his consent and whether or not anyone relied upon the decree in the interim. Ironically, this contention, which is advanced on behalf of the Sheriff, has never been asserted by the Sheriff himself and was not suggested by anyone to the district court.

There is no basis for review of this question here.

First, in the posture of this case, the premise of the question -- that the relief surpasses constitutional

requirements -- has not been established. The district court specifically found it unnecessary to decide the issue. This issue is not the same as that presented in Bell or Rhodes v. Chapman, 452 U.S. 337 (1981). Those cases held that whether multiple occupancy offends the constitution depends completely upon the particular circumstances of the confinement.[12] Bell v. Wolfish, 441 U.S. at 535; Rhodes, 452 U.S. at 346. The precise issue here would be whether it would be constitutional to subject pre-trial detainees to extremely dangerous conditions -- multiple occupancy, for lengthy periods, in cramped and non-observable housing units -- which were created solely because the responsible officials first agreed to bind themselves to single occupancy and then chose not to take any timely action to conform the design of the facility to their new occupancy plan. It is strongly arguable that double celling in these circumstances is arbitrary and not reasonably related to a legitimate governmental objective and therefore constitutes unconstitutional punishment without due process. Bell v. Wolfish, supra at 539.

Second, it is far too late in the lawsuit to make this claim. No party objected at the time the First Circuit ruled that the conditions of confinement in the new jail

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[12] Under the Sheriff's plan, detainees would be in their cells for 12 hours, fully half the day (as compared to only 7 1/2 hours in Wolfish, 441 U.S. at 541). And one third of the detainees here are held for more than sixty days (as compared to Wolfish where "over half of the detainees spent less than ten days at the jail, three quarters were released within a month and more than 85% were released within sixty days. Id. at 524-25, n.3).

would be subject to approval by the district court, see Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 100-02 (1st Cir. 1978). Nor did petitioner object to the decree -- he consented. Nor was there any objection when the district court entered the April 1985 order restating the obligation to maintain single cell occupancy in any larger facility. Again, petitioner assented. Nor did the petitioner support modification in the district court, or even object to its denial. Under basic principles of issue preclusion, petitioner may not raise the question at this stage of the litigation. See Montana v. United States, 440 U.S. 147, 153-154 (1979).

Third, this question has been recently and authoritatively decided by this Court. In Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986), the Court held that "a federal court is not necessarily barred from entering a consent decree because the decree provides broader relief than the court could have awarded after a trial," provided (1) the decree "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," (2) the decree "further[s] the objectives of the law upon which the complaint was based, and (3) the relief is not prohibited by law. Id. at 525-26.[13/]

The decree in this case clearly meets all three criteria. Petitioner does not contend to the contrary. Instead, he

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[13/] Local No. 93 was a 6-3 decision. Even the dissenters did not question the enforceability of such a consent decree upon a consenting party; they contended that a decree which goes beyond the law may not be imposed on an intervening party who does not consent. 478 U.S. at 539. Petitioner does not argue that Local No. 93 should be overruled.

suggests that a different result should obtain here because "[t]he Eleventh Amendment bars federal courts from requiring the sheriff, whose office is established by the Massachusetts Constitution, to provide inmates with more than the constitution requires." (Comm. Pet. at 29). He cites several cases holding that federal courts lacking judicial power under the Element Amendment cannot obtain it by consent decree. See Lelsz v. Kavanagh, 807 F.2d 1243, 1253 n.11 (5th Cir.), cert. dis. 483 U.S. 1057 (1987); Washington v. Penwell, 700 F.2d 570, 574-75 (9th Cir. 1983). But whether or not these cases were rightly decided, they are in no way in conflict with the decision here. The Sheriff is a county official, M.G.L. c.127 §16, and there is clearly no Eleventh Amendment bar. Mt. Healthy City School District v. Doyle, 429 U.S. 274, 280 (1977).

Petitioner's argument is utterly without merit. Petitioner's proposed rule would render consent decrees useless in all litigation with public officials, who would then be permitted to constantly relitigate, at will, any agreed-to relief they later contended was not actually compelled by law. As Judge Keeton noted, with considerable understatement, such a result "would make settlements in cases of this type worth very little." (Pet. App. 12a).

CONCLUSION

For the reasons stated above, the petitions for certiorari should be denied.

Respectfully submitted,

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January 18, 1991

APPENDICES

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 71-164-K

INMATES OF THE SUFFOLK COUNTY
JAIL, ET AL.,
Plaintiffs

v.
DENNIS J. KEARNEY, ET AL.,
Defendants

MEMORANDUM AND ORDERS AS TO
PRETRIAL DETENTION CENTER

October 2, 1978

GARRITY, J. The defendants Mayor and City Council and Commissioner of Correction have fulfilled the conditions stipulated in the opinion of the Court of Appeals dated March 17, 1978. In particular, the Mayor and City Council have agreed on a site, viz., the present location of the Charles Street Jail. They have made a commitment to adequate unding by the enactment of loan orders totalling $15,400,000 for the planning, designing, constructing and originally equipping a pretrial detention center which in our opinion meets the constitutional requirements of pretrial detention. The projected target date for the beginning of construction is September 1, 1979 and for completion, March 1, 1982. The plan which the court finds to be constitutional was filed by the city defendants

on September 28, 1978 entitled "Preliminary Architectural Program, Boston City Jail" (the "City Plan") and was enclosed with a letter dated September 27, 1978 from Donald B. Manson, Director of the Public Facilities Department of the City of Boston. The plan is prefaced by a two-page letter from Fred A. Powers to the Public Facilities Department dated September 26, 1978 and comprises 31 pages. The covering letter from Mr. Manson and the plan are attached hereto and incorporated in these orders, as Attachments A and B.

The Commissioner of Correction, acting pursuant to Mass. G.L. c. 34, § 14, has approved this plan with the qualifications stated in his filing on September 28, 1978 entitled Preliminary Response of the Commissioner of Correction and in the accompanying detailed analysis prepared by architectural planner Maria Theresa Cruz. At the hearing on September 28, counsel for the Commissioner and the city defendants stated that they were confident that the relatively minor deficiencies in the plan recorded by the Commissioner would be cured during implementation of the plan. The court therefore treats the Commissioner's preliminary response as the requisite statutory approval.

The court's conclusion that the City Plan meets constitutional requirements rests upon the filings heretofore described and the testimony at the hearing on September 28 of Fred A. Powers and on the positions of the parties stated at the hearing endorsing the City Plan. The plan is not an architectural design but rather a written description of the conditions of confinement of pretrial detainees as permitted in the opinion of the Court of Appeals dated March 17, 1978. The extent to which parts of the present Charles Street Jail will be renovated and the form of new construction, e.g., whether or not high-rise, have not yet

been decided by the planners. However, the critical features of confinement, such as single cells of 80 sq. ft. for inmates, are fixed and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions, are included. There are unequivocal commitments to conditions of confinement which will meet constitutional standards. According to Mr. Powers, who was spokesman for the architects at the hearing, further refinements in the architectural program will be made in the near future, at latest within one month, and a final architectural program will be prepared as soon as possible.

The Court of Appeals also stated in its March 17, 1978 opinion that this court should direct its attention to providing for an interim detention facility until renovation of the Charles Street Jail can take place, adding that such an interim facility could include use of the Charles Street Jail. Consideration of that question at this time would be premature. Until the nature and extent of renovations and new construction have been decided, the impact upon detainees housed at the jail and possible impingement on their constitutional rights cannot be evaluated. For this reason the court did not rule upon a motion of the Boston City Councillors filed September 22, 1978 that detainees continue to be lodged at the Charles Street Jail pending the completion of the new facilities.

Finally, the record of these proceedings should reflect our opinion that the conditions specified by the Court of Appeals' would probably not have been met except for the skill and professionalism with which Edward F. McLaughlin, Jr., Esquire, served as master and the assistance of Peter M. Lauriat, Esquire, his associate.

Accordingly it is ordered, adjudged and decreed as follows:

1. The City Plan filed September 28, 1978 is

approved as satisfying the terms and conditions set forth in the opinion of the Court of Appeals dated March 17, 1978 and in other orders entered by this court and the appellate court.

2. On or before November 3, 1978 the city defendants shall file and serve on the parties a modified architectural program and a modified estimated design schedule; and shall file and serve a final program and schedule as soon as practicable.

3. The city, county and state defendants shall without delay take all steps reasonably necessary to carry out the provisions of said preliminary, modified and final architectural program and estimated design schedule.

4. In carrying out the City Plan the defendants shall not change or depart from it in any substantial way except after written notice to the parties and court approval.

5. The parties shall endeavor to agree within one month upon a procedure and mechanism for monitoring compliance with these orders, such as periodic progress reports, perhaps filed jointly by some of the parties, perhaps to be filed in the first instance or only with Master McLaughlin. If they reach agreement, it should be filed with the clerk and the master. If agreement is not reached, separate proposals may be filed by any party on or before November 14, 1978.

6. While devising and executing the City Plan the defendants shall address explicitly its effect upon the inmates currently lodged at the Charles Street Jail and the conditions of their confinement. Programs and schedules shall contain subdivisions dealing with this subject. Pretrial detainees shall continue to be held at Charles Street Jail pending further order of the court. Any party may apply to the court for such an

order upon reasonable notice provided that the facts underlying any such application shall be set forth in affidavits.

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United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 71-162-K

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Plaintiffs

v.

DENNIS J. KEARNEY, et al.,
Defendants

ORDER
April 11, 1985

After considering plaintiffs' motion to modify the Consent Decree in light of changed circumstances, the Boston City Council's opposition thereto, and the views of all parties, the court finds that modifications are necessary to meet the unanticipated increase in jail population and the delay in completing the jail as originally contemplated.

It is therefore ordered, adjudged and decreed that the Consent Decree be modified as follows:

Nothing contained in the Consent Decree, however, shall prevent the defendants from increasing the capacity of the new facility if the following conditions are satisfied:

(a) single-cell occupancy is maintained under the design for the facility;

(b) under the standards and specifications of the Architectural Program, as modified, the relative proportion

of cell space to support services will remain the same as it was in the Architectural Program;

(c) any modifications are incorporated into new architectural plans;

(d) defendants act without delay and take all steps reasonably necessary to carry out the provisions of the Consent Decree according to the authorized schedule. In the absence of modification(s) of the schedule hereafter ordered or authorized by this court, or by a court of the Commonwealth of Massachusetts, the schedule will be as stated below. Any modification(s) of this schedule ordered or authorized by a court of the Commonwealth will automatically amend, as well, the schedule authorized under this order, unless one of the parties in this action files a written objection, together with a memorandum fully explaining the grounds of objection, within 30 days after entry of the modifying order or authorization, or such lesser time period as may be fixed by this court upon motion showing cause for more expeditious resolution of any disputed issue.

STEP	COMPLETION DATE
a. Final Architectural Plans	April 21, 1985
b. Value Engineering Review	June 3, 1985
c. Completion of all details	August 3, 1985
d. Review by all parties	Sept. 3, 1985

e. Incorporation of all final documents	Oct. 3, 1985
f. Bid process	Dec. 3, 1985
g. Contract awarded, Construction starts	Jan. 3, 1986
h. Construction of facility	Jan. 3, 1990

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UNITED STATES DISTRICT JUDGE